In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1444

ARTHUR M. FRANKE and NORMAN G. LINDSEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1969. A petition for rehearing was denied on April 24, 1969. Mr. Justice Marshall extended the time for filing a petition for a writ of

certiorari to May 31, 1969, and the petition was filed on May 26. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether reindictment of petitioners after they successfully moved to dismiss the original indictment because of a defective date constituted double jeopardy.

2. Whether there was probable cause for petitioners' arrest.

3. Whether the court erred in admitting in evidence testimony concerning conversations between petitioners and an informer overheard by means of a transmitting device which agents had concealed on the informer.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted of possessing counterfeit currency, in violation of 18 U.S.C. 472. On September 20, 1967, Franke was sentenced to imprisonment for ten years, Lindsey for six years. The court of appeals affirmed.

The evidence at the hearing on a motion to suppress and at trial is not in dispute, and may be summarized from the records in the lower courts as follows. One Dallas Barr was arrested in Terre Haute, Indiana, on November 28, 1965, for possession of counterfeit currency. He agreed to assist Secret Service agents in apprehending his suppliers. Pursuant to plan, Barr telephoned petitioner Franke in Thayer,

Missouri, and arranged to purchase approximately $20,000 in counterfeit currency from petitioners. Franke told Barr that he would probably make delivery in Terre Haute on December 2, 1965. Franke showed up unexpectedly on December 1, at which time he delivered to Barr $10,000 in counterfeit bills. Barr turned these notes over to the Secret Service agents.

A few days later, Barr made arrangements by telephone for Franke to deliver $100,000 in counterfeit currency to him in Terre Haute on December 8. At approximately 5:00 p.m. on the delivery date, Barr was searched by Secret Service agents and equipped with a concealed transmitting device. He was then driven to a truck stop previously designated as the place where he would meet petitioners. The agents took up surveillance positions nearby.

Petitioners arrived at the truck stop at about 8 p.m., and proceeded to negotiate with Barr for the disposition of the bogus notes. Barr said that he would contact the buyer to arrange for the transfer. Petitioners were suspicious and directed that the transaction take place elsewhere. They returned to their motel room while Barr advised agent Hale by telephone that the transfer would occur at another truck stop. Barr then joined petitioners at the motel room, informing them that the buyer would be at the newly designated truck stop at 10:00 p.m.

The agents were unable to overhear much of the conversations between petitioners and Barr because the reception was not particularly good. They did, however, hear petitioners state at the first truck stop

that delivery had been delayed because of the time required to dry or age the notes, that the bills were hidden nearby, and that it would take only a short time to get them. Shortly before 10 p.m., the agents observed petitioners leave the motel in their car and return a few minutes later. Petitioners and Barr then left in petitioners' car for the truck stop. Enroute, Franke told Barr to open a package lying on the floor of the back seat. Barr found counterfeit currency in the package. He examined a $20 note, and commented favorably on its appearance. On arrival at the truck stop, Barr left petitioners in the car and took one of the notes into the restaurant to show the "buyer". He then handed the note to an agent seated at a counter, and signalled other agents via the transmitter that petitioners' car contained counterfeit currency. The agents immediately arrested petitioners and seized the package which had been displayed to Barr. It was found to contain a large quantity of counterfeit $10 and $20 notes. The bogus $10 notes were identical to those delivered to Barr by Franke on December 1, 1965.

ARGUMENT

1. An earlier indictment had mistakenly charged petitioners with possessing counterfeit currency on December 8, 1966, rather than on December 8, 1965. At the first trial on September 19, 1966, during the selection of the jury, petitioners brought to the trial judge's attention the error in the indictment concerning the date and entered an oral motion to dismiss the indictment on that ground. The court completed

the selection and swearing of the jury and then conducted a hearing on the motion outside the jury's presence. After argument of counsel, the court sustained the motion to dismiss the indictment without prejudice. Thereafter, petitioners were reindicted and tried under the corrected indictment.

There is no merit to petitioners' contention that they were placed in double jeopardy by reindictment and the ensuing trial. It has been uniformly held that termination of a trial at any stage, or indeed reversal of the conviction itself, based on some defect in the indictment affirmatively asserted by the defendant cannot provide the basis for a plea of double jeopardy when the defect is cured by reindictment and a trial under the new indictment is thereafter had. *United States* v. *Ewell*, 383 U.S. 116; *United States* v. *Tateo*, 377 U.S. 463; *United States* v. *Ball*, 163 U.S. 662, 671-672; *Vaccaro* v. *United States*, 360 F. 2d 606 (C.A. 5); *Leigh* v. *United States*, 329 F. 2d 883, 884 (C.A.D.C.). Petitioners' case is particularly appropriate for the application of this rule, since the defect which led the court to dismiss the case was nothing more than a typographical error that could not possibly have misled them [1] or affected any of their substantive rights. See *United States* v. *Stapleton*, 271 F. Supp. 59 (E.D. Tenn.). No conflict in decisions exists on this point. As the court below noted (Pet. App. 2-3), neither *Downum* v.

---

[1] The first trial occurred in September 1966, three months before the date erroneously specified in the indictment—December 8, 1966—as the date upon which the offense was committed.

United States, 372 U.S. 734, nor *Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9), relied on by petitioners, involved a situation where an indictment was dismissed at the instance of a defendant.

2. At the time of arrest the agents had ample reason to believe that petitioners had committed a crime. By the time of arrest the circumstances known to the agents—gathered from sources which included Barr, visual surveillance, the transmitter, and the delivery of a $20 note to one of the agents—warranted a prudent man in believing that petitioners had counterfeit currency in their possession. The cases cited by petitioners are not remotely comparable. Probable cause for their arrest plainly existed here.

3. Petitioners also challenge the admission into evidence of the agents' testimony concerning conversations overheard by means of equipping Barr with a concealed transmitting device. In *United States* v. *White*, 405 F. 2d 838 (C.A. 7), the same court of appeals held that this form of electronic eavesdropping could violate the Fourth Amendment rights of an unaware defendant in the absence of a search warrant or court authorization. On April 7, 1969, the date of the decision below, this Court granted the government's petition for a writ of certiorari to review that decision (No. 1024, 1968 Term).[2] In

[2] Other courts which have considered this issue have held contrary to the Seventh Circuit. *United States* v. *Kaufer*, 406 F. 2d 550 (C.A. 2), affirmed, 394 U.S. 458; *Koran* v. *United States*, No. 25446 (C.A. 5), decided January 27, 1969; *Dancy* v. *United States*, 390 F. 2d 370 (C.A. 5); *Marshall* v. *United States*, No. 21,226 (C.A. 9), decided April 9, 1969; *Holt* v.

affirming petitioners' convictions, the Seventh Circuit, while alluding to its holding in *White*, determined that it was not necessary to consider the issue because the evidence obtained through eavesdropping, consisting of fragmented statements, some of which were barely audible, was harmless beyond a reasonable doubt, under *Chapman* v. *California*, 386 U.S. 18, 24 (Pet. App. 3-4).[3]

Action on the instant petition need not await this Court's decision in *White*. There the person who carried the device was not available as a witness at the trial, and the court of appeals inferred that it might have reached a different result if the informer had testified and the recording of his conversations was thereafter admitted only for corroboration (*United States* v. *White*, *supra*, 405 F. 2d at 847). Conversely, in petitioners' case the informer Barr testified at length and was unshaken after cross-examination. Petitioners failed to offer any evidence to refute Barr's testimony. The agents' supporting testimony, obtained from the challenged overhearing, related to but a small portion of Barr's damaging evidence. Under these circumstances, the overhearing is clearly controlled and sanctioned, as a constitutional matter, by *Lopez* v. *United States*, 373 U.S. 427. At all events, the decision in *Katz* v. *United States*, 389 U.S. 347, on which petitioner relies, even

---

United States, 404 F. 2d 914 (C.A. 10). See also *State of Washington* v. *Wright*, 444 P. 2d 676 (Wash. Sup. Ct.), certiorari denied, No. 977, 1968 Term (decided April 7, 1969).

[3] See also in this regard, *Harrington* v. *California*, No. 750, 1968 Term (decided June 2, 1969).

assuming that it changed the law with respect to overhearing with consent of one party, would not apply retroactively to the overhearing that occurred in the instant case. In this Court's recent decision in *Desist* v. *United States*, 394 U.S. 244, *Katz* was held to have only prospective effect with respect to overhearings taking place after December 18, 1967 —the date of that decision (see 394 U.S. at 254). See *Kaufer* v. *United States*, 394 U.S. 458.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

JUNE 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 353576 742